NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24.

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FEB 26 2009
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. BARBARA LYNN WHITE, Appellant.	2 CA-CR 2008-0247 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. CR200800373

Honorable Bradley M. Soos, Judge Pro Tempore

AFFIRMED

Terry Goddard, Arizona Attorney General
By Kent E. Cattani and Alan L. Amann
Tucson
Attorneys for Appellee

Harriette P. Levitt
Tucson
Attorney for Appellant

V Á S Q U E Z, Judge.

¶1 After a jury trial, appellant Barbara White was convicted of theft of a means of transportation, and the trial court sentenced her to an enhanced, presumptive prison term of 6.5 years. On appeal, she contends the state's late filing of a sentencing enhancement allegation and its withdrawal of a plea agreement violated her right to due process. For the reasons that follow, we affirm.

Facts and Procedural Background

¶2 On January 14, 2008, Arizona Department of Public Safety officer Peterson was on patrol, driving eastbound on Interstate 10, near the Toltec Road exit, in Pinal County. He noticed a blue Dodge Durango being driven approximately ten miles per hour below the posted speed limit. A records check on its license plate revealed the vehicle had been reported stolen three days earlier. Peterson then called for backup and initiated a "felony stop." The driver, White, immediately pulled over and, upon request, stepped out of the vehicle.

¶3 Peterson observed the vehicle's ignition had been pushed in towards the steering column, there were scratches and damage around the ignition, and the "safety pieces inside the cylinder" had been disabled. He also noticed a screwdriver inside the vehicle. White was arrested and charged with one count of theft of a means of transportation.

¶4 Before trial, the state offered a plea agreement which would have allowed White to plead guilty "to a class 3 felony, theft of a means of transportation, with a . . . stipulation to 3.5 years in the Department of Corrections, dropping the allegation of [a] prior

[offense and] . . . dropping the allegation the offense was committed while on probation." White filed a motion asking the court to vacate the trial date and set a change-of-plea hearing so that she could accept the plea agreement. However, the day before the hearing, she filed a pro se motion to change counsel on the ground her counsel was "pushing [her] to sign a plea . . . which [White] kn[e]w [wa]s unacceptable." The trial court denied the motion. After consulting further with her counsel, White decided to accept the plea agreement, but, by the time her attorney conveyed that to the prosecutor, the state had withdrawn the plea offer. A jury found White guilty as charged, and the court sentenced her to the enhanced prison term noted above. This appeal followed.

Discussion

¶5 White contends the trial court "abridged [her] constitutional rights to due process, her right to effective assistance of counsel, and her right to enter into a reasonably informed decision as to whether to accept or decline a plea offer." As best we can understand this argument, she asserts the state untimely filed the "while on probation" enhancement allegation and claims that, had she been given proper notice of the state's intent to file the allegation, she would have accepted the plea offer. She asks this court to either reinstate the plea agreement or vacate her enhanced sentence based on the untimely filing of the allegation.

¶6 Because White failed to object to the state's enhancement allegation below, we review only for fundamental, prejudicial error. *State v. Henderson*, 210 Ariz. 561, ¶ 19, 115

P.3d 601, 607 (2005). Fundamental error is "'error going to the foundation of the case, error that takes from the defendant a right essential to his defense, and error of such magnitude that the defendant could not possibly have received a fair trial.'" *Id.*, *quoting State v. Hunter*, 142 Ariz. 88, 90, 688 P.2d 980, 982 (1984).

¶7 Pursuant to A.R.S. § 13-604.02(B), a person who commits a felony offense while on probation for another felony shall be sentenced to the presumptive term of imprisonment and is not eligible for release until the sentence imposed is served.[1] The state may file an enhancement allegation based on the defendant's release status up to twenty days before trial, and the trial court, in its discretion, may permit the filing at any time before trial. *See State v. Waggoner*, 144 Ariz. 237, 239, 697 P.2d 320, 322 (1985) (finding twenty-day time limit in Rule 16.1, Ariz. R. Crim. P., applicable to enhancement allegations under § 13-604.02).

¶8 Here, the state filed the allegation on June 20, 2008, four days before the start of trial. However, on the first day of trial, the state informed the trial court that, under the terms of a plea agreement offered to White more than thirty days before trial, it had agreed not to allege White had committed the offense while on probation. And White's counsel stated at trial she had fully explained the terms of the plea agreement and White's potential sentence exposure if she rejected it. Therefore, more than twenty days before trial, by virtue

[1]This statute was recently renumbered by the legislature. 2008 Ariz. Sess. Laws, ch. 301, § 119. However we refer to the statute in effect at the time of White's offense.

of the terms of the plea agreement, White was aware that, if she did not accept the offer, the state intended to allege she had committed this offense while on probation. *See State v. Williams*, 144 Ariz. 433, 442, 698 P.2d 678, 687 (1985) ("A defendant is not prejudiced by [statutory] noncompliance . . . provided [s]he is on notice before trial that the prosecution intends to seek the enhanced punishment provisions of the statute."); *Waggoner*, 144 Ariz. at 239, 697 P.2d at 322.

¶9 Based on these facts, the trial court did not abuse its discretion by permitting the state to file the allegation, as there was no evidence that White was "misled, surprised or deceived in any way." *See State v. Bayliss*, 146 Ariz. 218, 219, 704 P.2d 1363, 1364 (App. 1985) (finding defendant must receive adequate notice of allegations of prior convictions under then A.R.S. § 13-604(K)). We find no error, let alone fundamental error.

¶10 White also contends she is entitled to reinstatement of the plea agreement, based on *State v. Donald*, 198 Ariz. 406, 10 P.3d 1193 (App. 2000), because her counsel rendered ineffective assistance.[2] Specifically, she asserts her counsel either was unaware of her probationary status or "neglected to consider that factor because the state had not [yet] filed the allegation." In either case, she contends her counsel should have known about the county attorney's deadlines for accepting plea agreements and failed to timely convey

[2]In *Donald*, Division One of this court held that, "a defendant may state a claim for post-conviction relief on the basis that counsel's ineffective assistance led the defendant to make an uninformed decision to reject a plea bargain and proceed to trial." 198 Ariz. 406, ¶ 14, 10 P.3d at 1200.

White's acceptance of the plea. However, "a request for reinstatement of a plea offer under *Donald* must be premised on a showing of ineffective assistance of counsel," *State ex rel. Thomas v. Rayes*, 214 Ariz. 411, ¶ 16, 153 P.3d 1040, 1043 (2007), and such claims are not cognizable on appeal. *See State v. Spreitz*, 202 Ariz. 1, ¶ 9, 39 P.3d 525, 527 (2002) ("[I]neffective assistance of counsel claims are to be brought in Rule 32[, Ariz. R. Crim. P.,] proceedings."). We therefore do not consider White's contentions further. *See id*.

¶11 For the reasons stated above, we affirm.

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GARYE L. VÁSQUEZ, Judge

CONCURRING:

_____
PETER J. ECKERSTROM, Presiding Judge

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J. WILLIAM BRAMMER, JR., Judge